

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

RECALL SECURE DESTRUCTION  
SERVICES, INC.<sup>1/</sup>

Employer

and

Case 9-RC-18285

UNITED FOOD AND COMMERCIAL WORKERS UNION  
LOCAL 277

Petitioner

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS  
LOCAL UNION 89, AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

Intervenor

**REGIONAL DIRECTOR'S DECISION AND**  
**ORDER DISMISSING PETITION**

**I. INTRODUCTION**

The Employer is engaged in the business of information management which involves picking up confidential material from customers and transporting the material to the Employer's Lexington facility to be destroyed in a secure manner. The Employer's Lexington, Kentucky facility is part of its Secure Destruction Division. The Petitioner filed a petition to represent certain employees of the Employer at its Lexington, Kentucky and Louisville, Kentucky facilities, but at the hearing, the parties stipulated that the Louisville facility would subject to a separate petition filed in Case 9-RC-18280 and that the instant case would be limited to the Lexington facility. In accordance with the agreement of the parties, this decision is limited to determining the appropriateness of a unit limited solely to Lexington, Kentucky.

The parties agree that any unit should include all full-time and regular part-time drivers employed by the Employer at its 2040 Creative Drive, Suite 250, Lexington, Kentucky facility, but excluding all technical employees, quality control employees, temporary employees, office clericals, and all professional employees, guard and supervisors as defined in the Act. However, the parties' disagree over the supervisory status of Operations Team Leader

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<sup>1/</sup> The name of the Employer appears as stipulated to by the parties at the hearing.

Carson Wade Ritchie. The Petitioner and Intervenor, contrary to the Employer, seek to include Ritchie in the unit while the Employer contends that Ritchie is a supervisor. As set forth in detail below, I have determined that Ritchie is a supervisor within the meaning of the Act. Further, because of my finding regarding Ritchie's supervisory status there is only one member of the bargaining unit. It is well settled that the Board will not certify a bargaining unit consisting of a single member and I shall, therefore, dismiss the petition.

In reaching my determination on this issue, I have considered the record evidence as a whole, as well as the arguments made by the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on this issue, I will first describe the Employer's operations, then set forth the applicable legal precedent and finally analyze the supervisory issue in relation to that precedent. I note there is no history of collective bargaining affecting any of the employees involved in this proceeding.<sup>2/</sup>

## **II. FACTUAL OVERVIEW**

### **A. The Employer's Operations and Workforce:**

The Lexington, Kentucky facility, which is 25,000 square feet, is presently staffed by only two employees: Operations Team Leader Carson Wade Ritchie and Security Service Representative (SSR) Jim Vickers. Area Operations Manager Joseph Schunder is based out of Cincinnati, Ohio and has authority over the Lexington facility and three other facilities. Mr. Schunder answers to Regional Operations Manager, Central and Northeast, David Albert.

The Lexington facility services clients in Lexington, southern Kentucky and the western part of West Virginia, including Charleston. Some of the clients are serviced on a regular schedule and others contact the Employer when they need service. Ritchie and Vickers travel separately to the clients' locations in the Employer's trucks where they pick up the materials to be destroyed which may be loose or stored in boxes or bins. They transport the material in locked containers back to the Employer's Lexington facility where it is unloaded and shredded by them. They carry handheld scanners to track their loads.

### **B. The Duties and Responsibilities of Team Coordinator Carson Wade Ritchie:**

Mr. Schunder testified that he travels to the Lexington facility about once every other week and that when he is not present, Ritchie is in charge of the facility. Schunder estimates that he talks to Ritchie by telephone at least once every other day. Ritchie was hired in 2006 as an SSR and has been an operations team leader since June of 2008. At present, SSR Jim Vickers is the only employee under Ritchie, but Ritchie also used to oversee a Destruction Center Specialist employee who was given a severance package and had his position eliminated pursuant to a reduction in force in September 2008.

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<sup>2/</sup> At the hearing of this matter the Intervenor introduced into evidence a section from a collective-bargaining agreement covering the Employer's Newark and Pomona, California facilities. The Intervenor represents that Operations Team Leaders are included in that unit, although there was no sworn testimony to that effect. In any event, no evidence was adduced as to the similarities or differences between the nature of the Employer's California operations and the facility at issue here. I attach no probative value to this evidence.

Ritchie and Vickers perform many of the same duties, such as driving trucks, picking up material from clients and shredding, but Ritchie also has unique duties and responsibilities that are reflective of his role as an operations team leader. Unlike Vickers, Ritchie is held responsible for the overall performance of the Lexington facility, including addressing customer complaints and ensuring that material is picked up and disposed of in a safe, secure and timely fashion. The record reflects that Ritchie could be disciplined by the Employer for Vickers' poor performance. Schunder, however, testified that Ritchie has never been disciplined in his role as operations team leader because he has performed well, but noted that an operations team leader in Cleveland, Ohio was disciplined when customers complained about poor service. The record does not reflect whether he was disciplined because of his own performance or because of the performance of other employees. While Ritchie is driving, he has access to a cell phone and radio to keep in touch with Vickers and the Employer's customer care center. The activities of his work day vary based on job requirements. Ritchie typically drives 4 days per week and is in the office the remainder of the time.

Significantly, it is Ritchie who decides how to carry out the duties of the Lexington facility. Ritchie determines when the work day begins and ends and is empowered to assign overtime to Vickers and himself based upon his assessment of how best to complete tasks and satisfy customers in a cost-effective manner. If Vickers wishes to take time off, he directs the request to Ritchie, who decides whether to grant the request. If Vickers is absent, Ritchie either handles his assignments or reschedules the clients accordingly, based upon his knowledge of their requirements. Ritchie also schedules his own time off and reports what he is doing to Schunder, but Schunder's approval is not required. Ritchie is empowered to require work on holidays. For instance, on Martin Luther King Day, which would ordinarily be a holiday for the Employer, Ritchie assigned Vickers to assist him in processing a large volume job. Ritchie did not consult with upper management in making this decision. Ritchie assigns the routes to Vickers and himself in order to maximize efficiency and he has discretion to permanently change routes as he sees fit. In deciding how to assign the routes, Ritchie considers such factors as the amount of equipment on the truck, the mileage involved and the requirements of the clients. Ritchie tracks the drivers' hours to make sure that they are in compliance with Department of Transportation requirements for hours of service. Ritchie and the team leaders from other facilities are permitted to transfer routes among themselves. No higher approval is required. The record discloses an instance in which Ritchie and the Louisville operations team leader agreed to transfer routes from the Lexington facility to the Louisville facility.

Ritchie is responsible for investigating accidents that occur at the Employer's facility and for enforcing the Employer's policy of drug testing whenever there is an accident. According to the testimony of Schunder, Ritchie has the authority to discipline Vickers if he were to refuse to work overtime or engage in other misconduct, but this has never happened. In this regard, Schunder testified that Ritchie has the independent authority to issue disciplinary warnings. The record reflects that the Employer's disciplinary policy involves the issuance of a verbal warning, then a written warning followed by termination. Schunder also testified that he would hold Ritchie accountable if Vickers failed to perform his duties as expected. Ritchie does not have authority to terminate anyone, inasmuch as these decisions are made by the Employer's Human Resources Department. Schunder testified that team leaders at other locations have issued

discipline, specifically referring to an incident in Cleveland where an operations team leader sent a disruptive employee home for the day without securing permission or prior approval. Schunder testified that he consults with the operations team leaders, such as Ritchie, when he fills out employee evaluations and asks them for their opinion of the SSR's performance. The employee evaluations can affect their pay.

Ritchie is on an e-mail mailing list for the Employer's managers. He has attended a regional meeting for operations managers. Personnel considered to be non-supervisory were not invited. Ritchie was required to sign a March 4, 2010 document confirming that all employees under his supervision had watched a video of a "town hall meeting" with the Employer's president.

The record reflects that if any of the Employer's trucks need to be repaired, Ritchie arranges for its repair and decides who will service the truck. If a truck is down for a prolonged period, Ritchie rents a replacement from either Penske or Ryder, with whom the Employer has contracts. He does not require approval to do this. When a rental truck is required, Ritchie decides who will operate the rental truck, which lacks locking mechanisms, and who will operate the Employer's truck, which has locking mechanisms. Ritchie decides when to schedule a recycling company, Recycle America, to come and pick up office waste for recycling. Ritchie and/or Vickers load the Recycle America truck, so Ritchie must determine how best to schedule the pick up so as not to interfere with the Employer's service to its customers. Ritchie decides who will load the truck. All employees who perform driver duties carry handheld scanners with route data of the customers that need to be serviced and the details of the work to be performed. At the end of the day the scanners transmit the information to the Employer's central database. Team leaders and managers have access to the database, but not SSRs. Ritchie completes daily operations reports using the Employer's intranet, which include information such as hours worked, miles driven, stops completed, number of bins scanned, and any safety or security incidents.

Ritchie and Vickers share the same benefits and amenities, including an onsite parking lot and a breakroom. Both are eligible to receive safety bonuses and both are paid hourly, but Ritchie earns approximately \$2 more per hour than Vickers. In contrast, Schunder receives a salary. The same leave policies apply to Ritchie and Vickers, as well as to management officials, such as Schunder. All employees and managers have the same healthcare benefits.

### **III. LEGAL ANALYSIS**

#### The Legal Framework:

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which defines a "supervisor" as:

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their

grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisor involved here possesses any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. At 3 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic*

*Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion “assign,” the Board considered that this factor shares with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term “assign” “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Id.*, slip op. at 4. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” *Id.* The Board clarified that, “. . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” *Id.*

In *Oakwood*, the Board explained that, “responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at slip op. 5-6. The Board reasoned, however that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*, at slip op. 7.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.* at slip op. 8. Independent judgment requires that the decision “rise above the merely routine or clerical.” *Ibid.*

Based on the record evidence, I find that the Employer has carried its burden of establishing that Carson Wade Ritchie is a statutory supervisor by showing that he possesses the authority to assign work, issue discipline and responsibly direct work. The un rebutted and unambiguous testimony established that Ritchie has full authority to assign work to Vickers and to schedule his work, including authority to grant time off, authorize overtime and require work on holidays. He utilizes independent judgment in deciding these issues, balancing his assessment of customer needs against the Employer's interests in keeping down costs. His discretion is not constrained in any way. The Board has held that designating a nursing staff person to regularly administer medications to a patient or group of patients would constitute assignment of a significant overall task, suggestive of supervisory authority, but that a one time directive to give medication to a specific patient would not be "assignment." *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 6 (2006). I find that Ritchie's authority to assign routes, essentially dictating the nature of Vickers' entire work day, is more analogous to the former example. The un rebutted testimony is that Ritchie has full authority to require, not merely request, Vickers to comply with his routing and scheduling decisions, backed by disciplinary authority to issue warnings if his orders are not followed. *ITT Lighting Fixtures*, 249 NLRB 441 (1980); *Cf. Pacific Beach Corp.*, 344 NLRB 1160 (2005). Although Ritchie lacks the power to terminate employees, under the Employer's disciplinary system, he has the authority to issue oral and written warnings, the only steps prior to termination. Even though Ritchie spends much of his time on the road, he has a cell phone and radio which enable him to keep in touch with Vickers and the Employer's other personnel.

In addition to assigning work to Vickers and possessing disciplinary authority, Ritchie also appears to responsibly direct Vickers. In *Oakwood Healthcare*, the Board interpreted the phrase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." *Oakwood Healthcare*, supra, slip op. at 6 (internal quotations omitted). The Board then held that for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. *Id.* slip op. at 6-7. Further, the Board held that to establish accountability, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 7. Again, the un-rebutted testimony was that Ritchie is held responsible for the performance of the Lexington facility, including that of Vickers. Although Ritchie has never been disciplined due to substandard performance by Vickers, Schunder testified that this is because Ritchie and Vickers have performed well.

While insufficient to establish supervisory status, Ritchie also possesses certain secondary indicia of supervisory status which bolster my conclusion that he is a statutory supervisor. In this regard, he received a pay increase when he was promoted from SSR to the Operations Team Leader position. Additionally, he attends management meetings, is on an e-mail mailing list for managers and has access to a database which is unavailable to non-supervisory personnel. Ritchie does share a breakroom and parking lot with Vickers, but this is not persuasive evidence of equivalency of status given the fact that they are the only two

employees at the facility. Although Ritchie and Vickers share the same health benefits and leave policy, this is also true of all of the Employer's personnel, including upper level managers.

For the foregoing reasons and based on the record as a whole, I conclude that the Employer has met its burden of proving that Operations Team Leader Ritchie is a supervisor within the meaning of Section 2(11) of the Act.

#### **IV. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the above-referenced discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The bargaining unit requested by the Petitioner would only consist of a single employee.
7. Inasmuch as a bargaining unit must consist of at least two employees, this petition is dismissed.

#### **V. ORDER**

Accordingly, having duly considered the matter,

**IT IS HEREBY ORDERED** that the petition be, and it hereby is, dismissed.



## **VI. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **April 19, 2010**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 5<sup>th</sup> day of April 2010.

/s/ Gary W. Muffley, Regional Director

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### **Classification Index**

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